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IN THE

Supreme Court of the United States

No. 929 . October Term, 1944.

PAULINE E. BARRY, Administratrix of the Estate of RALPH E. BARRY, Deceased,

Petitioner,

v.

READING COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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Petitioner,

v.

READING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

(Hereinafter the parties will be referred to as plaintiff and defendant, respectively.)

As stated in the petition filed in this cause, the plaintiff's intestate, Ralph E. Barry, while in the employ of the defendant as a brakeman, at its Rutherford yard in the State of Pennsylvania, received injuries from which he died. He fell from the head end of a draft of two cars he was riding down the west "hump" of the yard. These two cars were following a single car ridden by a brakeman named Rihm (309a, 310a). On page 3 of the petition it is stated that, "The cars collided but did not couple (310a, 311a) and Barry's body was seen falling from his car as Rihm's car moved down the track (193a)." If by this language it is meant that Barry fell from the car he was riding after it came against the car Rihm was riding, this is contrary to the evidence. The witness Baker, a switch tender in the defendant's railroad yard (179a), saw Barry "as he was landing on the ground on the ties" (184a). He said the car (obviously meaning the car which Barry was

riding) moved a car length and a half after Barry fell (184a). This witness testified that he had seen another "cut" going down No. 3 track immediately ahead of Barry's "cut". When asked by the plaintiff's counsel where "that car" was when Barry fell off, the witness answered "going down the track". When then asked how far away this other car was from Barry's cars, he answered he did not know (193a). Brakeman Rihm testified that as he was riding a car down track No. 3 he heard some one yell and turned around and saw two cars with no rider (309a, 310a). He slowed up his car and when the two cars without a rider came against it they immediately stopped (310a). He first said that when he saw the two cars without a rider following his, they were "not more than 8 car lengths away" (312a). After his recollection had been refreshed by a signed statement he had given shortly after the accident, he stated that the distance between his car and the other cars "was 3 or 4 car lengths" (221a).

There was absolutely no evidence to the effect that the cars Barry was riding collided with the car ahead before he fell off and all of the evidence on this point was to the contrary. Although on page 3 of the petition Brakeman Rihm is referred to as a "green brakeman", the evidence shows that he was employed as a brakeman at the Rutherford yard on May 1, 1942, and had worked at this yard during all the time that he was employed by the defendant (308a, 309a). The accident happened on October 14, 1942, at which time Rihm had been a brakeman for about five and one-half months.

On page 3 of the petition the following appears: "The evidence upon which plaintiff relied was apparently conceded by the defendant and the Court below to have made out a jury case. It was that it was the duty of Rihm to keep a look out ahead and behind (312a) to keep the cuts a safe distance apart (25a) and to avoid collision (22a); * * *"

This statement is absolutely misleading. It was never conceded by the Court or by the defendant that there was any question for the jury as to Rihm's conduct. At no time, by the pleadings or at the pre-trial conference or at the trial, was it suggested by the plaintiff that any negligence upon the part of Rihm was involved in the case.

It is claimed by the plaintiff that there was evidence from which the jury could have inferred that the ratchet wheel involved in this case was loose. There was an abundance of evidence from which the jury could have inferred that the ratchet wheel was not loose at all and other evidence that it was not loose enough to render the brake inefficient. Pictures of the brake were offered in evidence. Exhibits P-2, P-3, P-4, D-2, D-3, D-4.)

While the witness McCleary testified on direct examination that when he got on Barry's car after the accident he kicked the ratchet wheel so as to get the brack on another notch (64a), on cross-examination he admitted that the pawl may have engaged in the ratchet not because he kicked the ratchet but because he let up on the brake club (80a, 81a). The same witness testified on direct examination (64a) that the ratchet wheel was loose, but on cross-examination he admitted that he did not examine the ratchet wheel with his hand nor with a light (78a) and that when he got on the brake step after the accident and tried the brake it was on pretty tight and the pawl or "dog" was engaged in the ratchet wheel and was holding the brake on (82a).

The witness Conrad, foreman car inspector of the defendant (131a), examined the brake at 7:30 A. M. on the day of the accident (133a) and found no defects that would contribute to an accident (239a). The pawl and ratchet were in good operating condition. There was possibly 1/16 of an inch and positively not more than 3/16 of an inch play between the ratchet wheel and the brake rod (242a). The ratchet wheel on the car in question had a "guard" to keep it from rising, as required by Interstate Commerce

Commission regulations (242a). The brake step was equipped with split bolts to keep weather cracks from spreading. The split bolts ran through the step horizontally (247a). The brake step was tight and in good condition (248a). There was nothing about the brake wheel on this car that would make the hand brake inefficient (248a). The witness had previously been a freight brakeman and had operated cars in classification yards. In his opinion the hand brake in question was an efficient hand brake (249a).

The assistant foreman of car inspectors of the defendant examined the brake on the car from which the decedent fell, between 1:30 and 2:00 o'clock on the morning of the accident (198a, 199a). He found no defects in the brake (200a). The kind of a brake wheel on this brake would not make the brake inefficient (210a). In some brake wheels the spokes run (curve) to the right and in others to the left (211a). This witness examined the ratchet wheel and found no defects in it (211a). He applied the brake with a brake club, pushing on the brake club as hard as he could, and the pawl engaged in the ratchet wheel without his touching the wheel with his foot (213a). There was no looseness or play in the ratchet wheel (214a). The brake step was solid and firm (225a, 226a). Cracks in a brake step do not interfere with its use where split bolts are used (228a, 229a). When there was an accident in the defendant's yard it was the custom to set the cars involved aside for inspection, and not to make any repairs until after the inspection had been made (230a, 231a).

From the testimony of Arthur E. Scheellhouse, who was employed by the Pennsylvania Railroad Company as foreman car inspector (268a), it appeared that he examined the brake involved in this case on the morning of the accident at about 9:00 A. M. (269a, 270a). His testimony shows that he made a complete examination of the brake step and the hand brake (270a, 271a). There was not sufficient play between the ratchet wheel and the brake shaft to render

the brake inefficient (272a, 273a). The brake step was equipped with split bolts and the weather cracks in the step did not make it defective or unsafe (273a, 274a). On a Pennsylvania brake wheel the spokes run to the left, whereas on a Central of Georgia brake wheel they run to the right. Other railroads use brake wheels with spokes running to the right (274a, 275a). In his opinion the ratchet and pawl on the brake would have acted properly while the car was traveling down the hump (282a, 283a).

Charles N. Kittle, Division General Car Foreman of the New York Central System (285a), testified that the brake wheel on the brake involved in this case complied with the Interstate Commerce Commission regulations. He testified that this brake wheel, when placed on any car with a standard foundation, produces an efficient hand brake (290a, 291a).

John Thomas, general car inspector of the Lehigh Valley Railroad (295a), testified that the brake wheel on the brake Barry was using at the time of the accident, was a standard brake wheel for a railroad freight car (297a) and that the spokes in the brake wheels of various railroads do not all run in the same direction (297a, 298a).

It was stipulated that the accident happened on August 15, 1942, at about 12:20 A. M. (136a). After the accident the cars which Barry was riding when he was injured were put "back of the board" (140a) at about 1:00 o'clock, before any other cars were put on track No. 3 (141a). They were placed there for inspection (176a). The first inspection was made by assistant foreman of car inspectors Halbert between 1:30 and 2:30 A. M. on the day of the accident (197a, 198a). Foreman car inspector Conrad made his examination at 7:30 A. M. on the day of the accident (237a). Foreman car inspector Schellhouse, of the Pennsylvania Railroad, made his inspection about 9:00 o'clock of the same day (270a). Mr. Schellhouse arrived before Conrad had completed his inspection (240a). Mr. Mattern, defendant's foreman of car shops, was present when Schell-

house made his examination (270a). Mattern died before the trial (239a).

The trial court submitted the case to the jury, telling the jury that the plaintiff contended that the brake involved was inefficient because of the kind of a brake wheel with which it was equipped, and because there was too much play between the ratchet wheel and the brake shaft and because the brake step was split (333a). The jury was instructed that if the plaintiff's intestate met his death because the brake on the car he was riding or any of its appurtenances was defective or inefficient, the plaintiff was entitled to a verdict (336a). This was the only ground of recovery presented by the plaintiff. The jury was told that the test of an efficient hand brake is the performance of the brake when operated in the ordinary, usual and customary manner, and if the brake in this case when so operated failed to perform its function and such failure proximately contributed to the injuries and death of the plaintiff's intestate, she was entitled to a verdict (336a). The jury was also told that contributory negligence in this case neither constituted a complete defense nor diminished the damages (337a). The Court read to the jury the regulations of the Interstate Commerce Commission as to how a ratchet wheel shall be secured to a brake staff (333a). He stated that the dimensions mentioned in the regulations were minimum dimensions and that no maximum dimensions were given. He further said, "It is, after all, for you to determine whether or not the brake that was demonstrated here, when you consider the whole evidence, was a safe appliance within the meaning of the Safety Appliance Act."

On page 9 of the petition and on page 16 of plaintiff's brief it is stated that car inspectors of the defendant testified that the ratchet wheel was worn and loose. An examination of the portions of the testimony claimed by the plaintiff to support this rather unfair generalization will show that the car inspectors whose testimony is re-

ferred to said there was very little wear and not enough to impair the efficiency of the brake.

There was no evidence in the case as to what caused Barry to fall from the brake step of the car he was riding. No one saw him leave the brake step. While he was being removed from under the car he said that his foot got caught (66a). He did not say where it got caught, or whether it got caught before or after he fell from the brake step. All that can be said of this record is that there might have been some evidence of a highly unsatisfactory character from which the jury might have inferred that there was some defect in the brake, but there was absolutely no evidence that any such defect caused the plaintiff's intestate to fall from the brake step. The cause of this fall was entirely in the realm of speculation. The defendant was entitled to have a verdict directed in its favor.

The jury rendered a verdict in favor of the defendant. Plaintiff's application for a new trial was denied. An appeal was taken to the Circuit Court of Appeals and argued before three judges. These three judges unanimously affirmed the judgment in favor of the defendant. Plaintiff then applied for a reargument and the case was reargued in the Circuit Court of Appeals before five judges. This Court again affirmed the judgment in favor of the defendant by a vote of four to one, Judge Biggs dissenting and filing a dissenting opinion.

ARGUMENT.

(1).

The Trial Court Did Not Misconstrue the Safety Appliance Act or the Regulations of the Interstate Commerce Commission.

Under point (1) of his brief the attorney for the petitioner apparently contends that the trial Court should have found as a matter of law that the hand brake in question did not comply with the regulations of the Interstate Commerce Commission.

The regulations of the Interstate Commerce Commission contained in its order of March 13, 1911, prescribe, among other things, certain specifications for hand brakes. On page 2 of this order the following appears:

> "The brake-shaft shall not be less than one and one-quarter (1¼) inches in diameter, of wrought iron or steel without weld."

On page 3 the manner of attaching the ratchet-wheel to the brake-shaft is prescribed as follows:

> "The brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square-fit shall be not less than one and five-sixteenths (1 5/16) inches square. When ratchet wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl."

It will be noted that only minimum dimensions are given for both the brake-shaft and the square fit of the ratchet-wheel. The regulations do not say that if the brake-shaft is of the minimum size the square fit must be of the minimum fixed for it. It is clear that the Interstate Commerce Commission has not undertaken to state how much space is permitted between the square portion of the brake-shaft and the square fit of the ratchet-wheel.

It is interesting by way of contrast to note the method prescribed for attaching the brake-wheel to the brake-shaft. This appears on page 3 of the Commission's order of March 13, 1911, and is as follows:

> "Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths (7/8) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches."

In Plate A, incorporated in the above mentioned order, there is shown the tapered square fit to be used in applying a brake-wheel to a brake-shaft. Above the brake-wheel there must be a nut and a cotter pin and the cotter must either be "riveted over" or a lock nut must be used. Obviously a tapered square fit, such as prescribed for attaching the brake-wheel to the shaft, produces a tight fit, and these regulations show that the Commission when it made the order did not expect that the ratchet-wheel should be attached with as tight a fit as was prescribed for the brake-wheel.

Another provision of the regulations which shows that the Commission anticipated that there would be some play between the ratchet-wheel and the brake-shaft, is the following:

> "When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl."

Judge Biggs in his dissenting opinion in the Court of Appeals takes the position that under the Interstate Commerce Commission regulations, where the brake-shaft has a diameter of one and one-quarter (1¼) inches, the square fit of the ratchet-wheel must never be larger than one and five-sixteenths (1 5/16) inches. He says that when the Commission says "the square fit shall not be *less* than one and five-sixteenths (1 5/16) inches square", the Commis-

sion means that "the squart fit shall not be *more* than one and five-sixteenths (1 5/16) inches square" when the brake shaft is one and one-quarter inches in diameter. As he also says that there was uncontroverted evidence in this case that the brake shaft was designed to be one and one-quarter inches in diameter, and that the square fit of the ratchet wheel was designed to be one and five-sixteenths inches square, it follows, according to his view of the matter, that any amount of wear between the brake-shaft and the square-fit of the ratchet-wheel, which would increase the space or play between these two parts, would constitute a violation of the regulations. It is obvious that when a hand-brake of this character has been used for even a short period of time (with metal rubbing metal) there will be some wear between the square-fit of the brake shaft and the square of the ratchet wheel. According to the view of Judge Biggs, any amount of measurable wear which increases the space between the brake shaft and the square of the ratchet wheel beyond one-sixteenth of an inch would constitute a violation of the regulations of the Commission. The impracticability of this view demonstrates itself and supports our view that the Interstate Commerce Commission did not undertake to say in its regulations how much space or play is permissible between the brake shaft and the ratchet wheel. The fundamental test is whether the brake is an efficient brake. If there is so much looseness or play as to make the brake inefficient, this is a violation of the Safety Appliance Act.

In this case there was evidence as to the tightness of the fit of the ratchet wheel on the brake shaft. One witness testified that he did not find any "looseness or play" (214a). Another witness said, "I would say there was possibly 1/16 of an inch play, between 1/16 and, there wasn't 3/16, I am positive of that." (242a). Still another witness gave it as his estimate that there was somewhere between 1/16 and ⅛ of an inch space between the brake shaft and the ratchet wheel (284a). While the witness Mc-

Cleary, called by the plaintiff, testified on direct examination that the ratchet wheel was loose (64a), on cross-examination he admitted that he did not examine the ratchet wheel with his hand nor with a light (78a).

In the face of this testimony, the Court could not have found as a matter of law that the brake did not comply with the regulations of the Interstate Commerce Commission relating to the securing of the ratchet wheel to the brake shaft even if Judge Biggs' construction of the regulations were right, which, of course, we do not admit. One witness testified there was no looseness or play, and two other witnesses who examined the brake gave testimony from which it could and perhaps should be inferred that the play was as little as 1/16 of an inch. When a witness testifies that a given distance is somewhere between 1/16 and 3/16 of an inch this is hardly proof that it is more than 1/16 of an inch. All such testimony means is that the witness is unable to judge the distance more closely than that it was somewhere between 1/16 and 3/16 of an inch, or, as in the case of another witness, between 1/16 and ⅛ of an inch.

As shown above there was abundant evidence that there was not sufficient play or looseness between the brake shaft and the ratchet wheel to make the brake inefficient.

The Court submitted to the jury the question as to how much play there was between the ratchet wheel and the brake shaft, and whether or not there was so much play as to render the brake inefficient. This is certainly all, and, probably more, than the plaintiff was entitled to have done in view of the evidence.

(2).

Admissibility of Opinion Evidence.

The next point made by the plaintiff's attorney is that the trial Court committed error in admitting evidence offered by the defendant as to inspections made of the brake in question, and the opinions of expert witnesses as to its operating condition.

The plaintiff offered as an expert witness a conductor in the employ of the Pennsylvania Railroad Company (94a). This witness was employed at Morrisville, Pa. (96a) and had never seen the car in question so far as the record shows. He was asked by plaintiff's counsel and gave his opinion as to the effect of the use of a Central Railroad of Georgia brake wheel on a Pennsylvania freight car (99a) and as to ratchet wheels (100a, 101a, 104a).

The witnesses called by the defendant as experts were its foreman of car inspectors (131a), its assistant foreman of car inspectors (198a), a foreman car inspector of the Pennsylvania Railroad Company (268a), the Division General Car Foreman of the New York Central Railway Company (285a), and the General Car Inspector of the Lehigh Valley Railroad Company (295a).

The accident happened on August 15, 1942, at about 12:20 A. M. (136a). The testimony showed that the cars ridden by Barry were moved at 1:00 o'clock on that morning to a place "back of the board" (140a). They were placed there for inspection (176a). Halbert, the defendant's assistant foreman of car inspectors, made his examination of the brake between 1:30 and 2:00 o'clock on the morning of the accident (198a, 199a). Foreman Car Inspector Conrad made his examination at 7:30 o'clock on the same morning and before his examination was completed, Foreman Car Inspector Schellhouse, of the Pennsylvania Railroad, arrived to make his inspection (240a). The witnesses from the New York Central Railroad and the Lehigh Valley Railroad did not inspect the brake in question but testified as experts in response to hypothetical questions.

The testimony showed that it was the custom in the yard of the defendant, when an accident occurred, to set the cars involved in the accident aside for inspection and not to make any repairs until the inspection had been made (230a, 231a). There is, of course, no testimony that any repairs or changes were made to the car in question be-

tween the time of the accident and the time of the inspections.

The law is well settled that the admission of evidence as to inspections of property rests in the sound discretion of the trial Judge. *Reading Company v. Geary,* 47 F. 2d 142. In that case measurements made more than two years after the accident were admitted in evidence. 1 *Wigmore on Evidence* (2d Ed.) 772, is cited in this opinion. Mr. Wigmore says:

> "This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down and has even been spoken of as a presumption. * * * That no fixed rule can be prescribed as to the time or conditions within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. * * * The precedents show the principle applied to all manner of subjects:— to the condition of a highway, or of a bridge, or of a railroad track, station, or roadbed, or of a stream, or of premises, without or within, or of machinery or apparatus. * * * The matter should be left entirely to the trial court's discretion." 1 Wigmore (2d Ed.) 772, 773, 774, 775.

In *Marathon Lumber Co. v. Dennis,* 296 Fed. 471, evidence as to the condition of a "lever car" two days after the accident, was held admissible. In *O'Brien v. Las Vegas & T. R. Co.,* 242 Fed. 850, evidence of the condition of a drain cock 8 or 10 days after an accident, was held admissible. See also *Boston Excelsior v. Sweatt,* 229 Fed. 321.

It is respectfully submitted that the admission of defendant's evidence as to the condition of the hand brake in question was within the sound discretion of the trial Judge and furthermore, that the evidence was properly admitted.

The record shows beyond question that the expert wit-

nesses called by the defendant were qualified (132a, 197a, 201a, 236a, 237a, 244a, 249a, 268a, 269a, 285a, 286a, 295a, 296a). They were all foreman or assistant foreman car inspectors of various railroads. Certainly they were far better qualified than the plaintiff's expert who was a conductor.

Whether a witness offered as an expert is qualified is a question to be decided by the trial Judge in the exercise of a sound discretion.

Gila Valley, G. & N. Ry. Co. v. Lyon, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276;
Congress & Empire Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487;
White v. Maryland, 106 F. 2d 392;
Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823.

There was no impropriety in the overruling of the plaintiff's objections to questions calling for the opinion of the defendant's experts as to the efficiency of the hand brake. Testimony of this same kind had been offered by the plaintiff through the witness Tettemer, and admitted by the Court (104a). Similar questions were asked by plaintiff's counsel of the witness McCleary and allowed (41a).

The testimony showed that the expert witnesses called by the defendant were men of broad experience in the inspection and repair of railroad freight cars and were competent to express opinions as to the efficiency of the brake.

Testimony of this kind is admissible under the New Jersey decisions. See: *Crosby v. Wells,* 73 N. J. L. 790; *Wheeler & Wilson Manufacturing Co. v. Buckhout,* 60 N. J. L. 102; *Convery v. Conger,* 53 N. J. L. 468. Numerous cases cited in the footnote to sec. 1951, Vol. 4 Wigmore on Evidence (2nd ed.) are to the same effect. See also sec. 1976.

Evidence admissible under New Jersey decisions was admissible in this case. Rule 43 (a) Federal Rules of Civil Procedure.

(3)

Effect of Prior Inconsistent Statements.

There was no error in sustaining the defendant's objection to the question to the plaintiff's witness McCleary, as to whether or not a statement signed by him for the plaintiff was true.

McCleary was called by the plaintiff as her witness (15a). The plaintiff being dissatisfied with a portion of his testimony, the witness was shown a statement which he had signed (50a). After stating that he had made the statement to Mr. Foley (an investigator for plaintiff's counsel) the witness was asked whether or not the statement was true when he made it (58a). This was objected to upon the ground that the plaintiff had no right to impeach this witness, the witness not being the kind of a witness who may be impeached by a party calling him, under rule 43 subdivision (b) of the Federal Rules of Civil Procedure. He was not a party, an officer, a director or managing agent of a corporation or of a partnership or association which is an adverse party. The plaintiff was entitled to use this statement to neutralize the testimony of the witness so far as it differed from the statement (62a) and was permitted to do so.

On this point the plaintiff relies upon the case of *Stewart v. B. & O. R. R. Co.*, 137 F. 2nd 527. In that case the Court apparently applied the New York rule and permitted a hostile witness to be cross-examined by the plaintiff for the purpose of impeachment, and after he had testified that an affidavit he had made was true, the plaintiff was permitted to use this affidavit as affirmative proof of her case. No reference is made to the Federal Rules of Civil Procedure in connection with this ruling. The opinion is silent as to whether objection was made to asking the witness whether or not the affidavit he had signed was true.

Paragraph (b) of rule 43 of the Federal Rules of Civil Procedure is as follows:

> "(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions nad contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

This rule makes a clear distinction between the witnesses who may be impeached and those who may not.

In vol. 3 of Moore's Federal Practice, p. 3075, in commenting upon rule 43 the author says:

> "The Federal practice that in general a party may not impeach his own witness is also continued, subject to the following exceptions: (1) if the witness is an adverse party (or an officer, etc., thereof) he may be impeached, and (2) rule 26 d-1 provides that 'any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.' "

The plaintiff's position cannot be sustained upon the theory that it is supported by the law of the State of New Jersey. Under the law of this State a party cannot impeach his own witness, although statements made contrary to testimony may be shown to neutralize the testimony where surprise is pleaded. *Brinkmann v. Dorsey Motors Inc.*, 121 N. J. L. 114, and cases there cited.

In the case of *Southern Rwy. Co. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030, the Court said:

> "In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-

examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. *Of course, the contradictory statements can have no legal tendency to establish the truth of their subject matter.*"

Wigmore says, Vol. 2 (2d Ed.) 460:

"It is universally maintained by the courts that prior self contradictions are not to be treated as having any substantive or independent testimonial value."

(4)

Right to Rely Upon General Negligence.

The plaintiff contends that the trial Judge erroneously eliminated from the case the plaintiff's right to recover damages for negligence other than the alleged violation of the Safety Appliance Act.

The only claim pleaded in the complaint was a violation of this act.

The facts relied upon by the plaintiff are stated in the fifth paragraph of the complaint (3a). This paragraph is as follows:

"Fifth: On said date plaintiff's decedent boarded the westerly end of the lead car on the cut of the two coal cars and positioned himself on the brake platform to use the handbrake, with the aid of his brake club, for the purpose of controlling the movement of said cut of cars from the hump track to track #3. While plaintiff's decedent was so engaged in accordance with the custom, practice and rules in full force and effect at the time that said plaintiff's decedent was so employed by this defendant, by reason of the handbrake its parts and appurtenances being inefficient and defective, the plaintiff's decedent was caused to be thrown to the ground below causing plaintiff's decedent to be injured and causing his death on August 16, 1942."

The sixth paragraph (3a) merely alleges that it was the duty of the defendant to comply with the Safety Appliance Act. The seventh paragraph (3a, 4a) undertakes to tell why the hand brake was inefficient and states that "as a direct and proximate result of said defect and inefficiency as aforesaid, this plaintiff's intestate received injuries which resulted in his death." The eighth paragraph (4a) alleges that the decedent's death was caused solely by the negligence of the defendant in using a car not equipped with a safe hand brake and in that it used on its line a hand brake, its parts and appurtenances, which were inefficient and defective, and in that the defendant failed to provide the plaintiff's intestate with a safe place to work.

It is now contended by the plaintiff that because of this allegation that the defendant failed to provide the plaintiff's decedent with a safe place to work, an issue was raised as to the negligence of the fellow servants of the plaintiff's intestate in the manner in which they conducted their work of classifying cars in the defendant's yard. It is not claimed that there was anything wrong with the tracks or other structures in the yard. The plaintiff's theory is that an allegation of an unsafe place to work supports a claim of any kind of negligence in the operation of a railroad.

The case of *Louisville & N. R. Co. v. Stewart* (1940) 283 Ky. 585, 142 S. W. 2d 119, is directly in point on this question. This was an action under the Federal Employers' Liability Act, and a judgment for the plaintiff was reversed by the Court of Appeals of Kentucky because of the error of the trial Court in submitting to the jury an issue not raised by the pleadings. The Court of Appeals said:

> "Appellee's petition is rather lengthy and we therefore refrain from setting it out, but we have carefully considered it and can read out of it *only a charge of negligence upon the part of appellant in failing to provide appellee a safe place in which to work.* There is

no allegation of negligence on the part of the appellant in the movement or operation of its train or from which an inference of such would necessarily arise. It is therefore manifest that the instruction permitted recovery against appellant for negligence or failure of duty upon its part which is not charged in the petition; and the conclusion is inescapable that this is prejudicial error."

At the pre-trail hearing in this case, held under rule 16, it was agreed that the only claim of liability was that the hand brake was defective (7a, 8a, 9a, 10a). This appears from the following excerpt of the proceedings of the pre-trial conference:

"THE COURT: What about interstate commerce in the case?

MR. FUERST: That is admitted in the pleadings. *The facts are not in dispute in this case except Mr. Gildea denies the fact there was a defective brake, which is the only issue in the case.*

That, of course, was covered fully by the depositions that were taken here in Trenton some weeks ago.

THE COURT: The complaint alleges a defective hand brake.

MR. FUERST: That is right.

MR. GILDEA: That is the only issue.

THE COURT: There is nothing we can do. Was it a defective hand brake?

MR. GILDEA: Mr. Fuerst says it was and I say it was not."

In his opening statement to the jury (12a, 359, 360, 361) plaintiff's attorney read the complaint (except that he did not mention the amount sued for) and then stated to the jury that he would show that the plaintiff's intestate was injured and killed as a result of being furnished an ineffi-

cient hand brake. No other offer of proof or claim of negligence was mentioned.

At the trial the plaintiff submitted 19 requests to charge. (343a, 344a, 362, 363, 364, 365, 366, 367.) It will be noted that while several of these requests dealt with the alleged inefficiency of the hand brake and its appurtenances, not one of them dealt with any other claim of negligence. In the 10th, 11th, 12th, 16th and 17th requests the Court was asked to charge the jury that if they found that the hand brake or any of its appurtenances was inefficient and that this inefficiency proximately contributed to the death of the decedent, the plaintiff was entitled to a verdict. The Court was not asked to charge the jury that any other finding would entitle the plaintiff to a verdict.

In the 18th request to charge of the plaintiff the Court was asked to charge the jury that if they found for the plaintiff a verdict should be awarded for the full amount of damages suffered by the plaintiff and her minor daughter, as the result of the death of plaintiff's intestate. This request to charge eliminated contributory negligence from the case and, of course, contributory negligence could not have been eliminated in connection with any claim of negligence other than a violation of the Safety Appliance Act, 45 U. S. C. A. 610.

Rule 51 of the Rules of Civil Procedure requires that requests to charge be submitted in writing at the close of the evidence and that the Court inform counsel before the argument to the jury of its proposed action on the requests. In *Dallas Railway & Terminal Co. v. Sullivan,* 108 F. 2d 581, it was held that one complaining of the refusal to give a charge must be prepared to show that he requested it in writing.

The plaintiff's attorney made no request in writing dealing with any claim of negligence, other than the alleged violation of the Safety Appliance Act.

In the second oral request to charge made after the Court's charge the Court was asked to charge the jury that

"the plaintiff is entitled to be provided with a reasonably safe place to work, as provided for under the Federal Employers' Liability Act" (341a). This is not a correct statement of the law if the plaintiff referred to something other than a violation of the Safety Appliance Act. The law is that in such cases the master is obliged to exercise reasonable care to provide the workmen with a safe place to work. *Baltimore & Ohio R. R. Co. v. Robertson,* 300 Fed. 314. This general duty is not an absolute one as it is ni cases under the Safety Appliance Acts.

If an issue had been raised as to negligence upon the part of the fellow employees of plaintiff's intestate in the manner in which the work in the defendant's yard was being conducted, there was no evidence which would have justified the Court in submitting this question to the jury and it would have been error for him to do so. The uncontradicted evidence was that the plaintiff's intestate had fallen from the cars he was riding before these cars came against the car being ridden by Brakeman Rihm. Rihm testified that when he heard some one shout and turned around he saw Barry's two cars following his car and that there was no rider on these cars (309a, 310a). On cross-examination he said that when he saw these two cars following his, without a rider, they were eight car-lengths from his car or about a block and a half away (312a). On re-direct examination, after his recollection was refreshed from a statement he had made immediately after the accident, he said the cars without a rider were three or four car-lengths away when he first saw them (322a). There was no testimony contrary to that given by Rihm and there was no evidence whatever that Barry was on the two cars he was riding down the hump when they came against Rihm's cars. Rihm slowed down his car to catch Barry's cars, when he saw they had no rider (310a). While there was testimony to the effect that Rihm's car was traveling more slowly than the cars ridden by Barry (20a) the cars were eight to ten car-lengths apart when Brakeman McCleary shouted to Rihm and Barry

(23a). After shouting McCleary paid no more attention to these cars until after the accident (26a).

There was absolutely no evidence from which the jury could have found that the difference in speed between the car ridden by Rihm and the cars ridden by Barry contributed to the accident.

In an action under the Federal Employers' Liability Act for injuries sustained by a railroad employee, the employee must produce substantial evidence of negligence and cannot base his case upon mere speculation. *Brennan v. B. & O. R. Co.*, 115 Fed. 2d 555. Certiorari denied, 61 Sup. Ct. 611, 312 U. S. 685, 85 L Ed. 1123.

To recover under this act for the death of a signalman who was killed when a train collided with his inspection car, plaintiff was required to prove not only that the railroad was negligent, but that death resulted proximately from such negligence. *Deere v. Southern Pacific Co.*, 123 Fed. 2d 438. Certiorari denied, 62 Sup. Ct. 907, 315 U. S. 819, 86 L. Ed. 1216.

Persons claiming under the Federal Employers' Liability Act must adequately establish negligence and its causal connection with injury. *Atchison T. & S. F. R. Co. v. Saxon*, 52 Sup. Ct. 229, 284 U. S. 458, 76 L. Ed. 397.

It is therefore submitted that even if the question of negligence upon the part of Brakeman Rihm, or any other employee, had been presented by the pleadings and proceedings in this case, there was no evidence which would have warranted its submission to the jury.

Plaintiff's counsel now contends further that there was evidence from which the jury could have found that there was a violation of the Safety Appliance Act because the cars which Barry was riding did not couple to the car ridden by Rihm when these care came together. No such claim was made in the pleadings or at any time during the trial, and obviously was an afterthought. However, as stated above, the uncontradicted evidence showed that Barry had fallen from his cars before they came against Rihm's car.

The evidence further shows that after they came against Rihm's car, Barry's cars stopped (310a). If Barry's cars had coupled to Rihm's car, either they would have stopped the latter and all three cars would have been standing still, in which event the situation so far as Barry was concerned would have been no different, or Barry's cars would have continued with Rihm's car, in which event he would have been run over by the second car in his draft as well as the first. Obviously, the failure of the cars to couple had nothing to do with Barry's injuries.

Furthermore, it was held in *Lang v. N. Y. Central Ry. Co.*, 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729, that the coupler provisions of the Safety Appliance Act are designed only for the protection of those engaged in coupling cars. In that case a brakeman was injured when two cars, one of which had no coupler, came together. If there had been a coupler there would have been sufficient room between the ends of the cars to prevent injury. There being no intention to couple the cars, the Court held that the brakeman was not entitled to the benefits of the act.

In the present case Rihm's testimony showed that no effort was made to couple his car to the two following. When asked what he did as the cars came together he said, "I released the brake in order that they will meet without giving me too much of a bump." (310a.)

In the plaintiff's brief it is claimed that the Court deprived the plaintiff of her right to recover damages under the Federal Employers' Liability Act. This is not true. The plaintiff's case could have been submitted to the jury only under the Federal Employers' Liability Act as this act is controlling where interstate commerce is proved or admitted, as it was in this case. Where there is interstate commerce the remedy for a violation of the Safety Appliance Act is obtained under the Employers' Liability Act. Except for this act the suit could not have been brought in the United States District Court for the District of New Jersey as both parties are residents and citizens of the

State of Pennsylvania. Furthermore, except for the provisions of the Employers' Liability Act the Court could not have charged the jury that contributory negligence upon the part of the plaintiff's intestate would have no effect upon her rights. This charge is authorized only by section 7 of this act, (45 U. S. C. A. p. 610) which provides that no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to the injury or death of such employee. Contributory negligence is a complete defense to an action under the Safety Appliance Act where the employee is not engaged in interstate commerce. *Schlemmer v. B. R. & P. R. Co.*, 220 U. S. 590, 31 S. Ct. 561, 55 L Ed. 596.

It is clear that plaintiff's counsel is in error when he says that the Court eliminated the right of the plaintiff to recover under the Federal Employers' Liability Act.

(5)

Alleged Error in Charge.

The plaintiff contends that the trial Court erred in charging the defendant's third request to charge (345a) without stating in connection therewith that the jury might "consider the circumstances and make reasonable inferences therefrom." In his charge the Court did the very thing which the plaintiff's attorney says he did not do. After charging the defendant's third request in substance, the Court further told the jury that his recollection was to the effect that Barry was seen in the position where he would have been if he were manipulating the brake; that shortly thereafter Barry was found beneath the car; that if the jury found that there was a defective or inefficient brake they could take all the circumstances connected with the case into consideration in determining whether such defect or inefficiency in the brake was shown to be the proximate or a proximate contributing cause of the injury (338a, 339a). The Court clearly charged the jury on the issues

they must decide and left it to the jury to say whether the evidence showed that Barry was caused to fall from the car because of any inefficiency in the brake, the brake wheel, the fit of the ratchet wheel, or the condition of the brake step.

The circumstantial evidence was submitted to the jury and the jury was not told that they could not base a verdict for the plaintiff upon such evidence alone. Indeed, if it had been the view of the Judge that a verdict could not be founded on circumstantial evidence, he would have had to direct a verdict for the defendant in this case.

No attack is made by the plaintiff upon the defendant's third request itself. If it be necessary to cite authorities to support the language of this request, we submit the following: *N. Y. L. E. & W. R. Co. v. Estill,* 147 U. S. 581, 13 Sup. Ct. 444, 37 L. Ed. 229, and particularly Judge Thayer's charge printed as a footnote to this opinion. *Rest v. Mutual Life Ins. Co.,* 112 Fed. 769, 773; *Mayfield v. Aetna Life Ins. Co.,* 100 Fed. 2d 199, 201; *Del. & Hudson Co. v. Ketz,* 233 Fed. 31, 36; *Patton v. Texas & P. R. Co.,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361

It is the firmly established rule that in examining a charge to a jury to determine its correctness, the charge must be considered as a whole Taken as a whole, the charge in this case clearly set forth the issues and was comprehensive, intelligible and legally correct.

Plaintiff's attorney also contends that the trial Judge erred in declining to charge an oral request, made after the charge was delivered, to the effect that there was a presumption that the decedent was exercising reasonable care for his own safety at the time of the accident. (340a, 341a.) As there was no question in the case as to the care exercised by the decedent, this request was properly denied. At the request of the plaintiff (365) the Court had already charged the jury that contributory negligence on the part of the decedent would neither bar recovery nor diminish damages. (337a.)

CONCLUSION.

No reason appears for the granting of a writ of certiorari in this case, and the application therefor should be denied.

Respectfully submitted,

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